Pernec Corp Bhd v A & AT Advanced Power Systems Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–1006 OF 2010
ABDUL WAHAB PATAIL, AZIAH ALI AND ANANTHAM KASINATHER JJCA
18 JANUARY 2013

Contract — Agreement — Consultancy agreement — Assisted to procure contract — Consultancy fees — Appeal against — Whether works reflected in disputed Celcom's purchase order was connected to works done under phase 6 — Whether trial judge properly analysed entirety of evidence given — Whether decision arrived at was without judicial appreciation of evidence — Whether appellate interference warranted

Evidence — Best evidence — Document — Disputed Celcom's purchase order — Absence of evidence to contradict evidence adduced by appellant — Maker of document not called to testify — Requirement of best evidence rule

The appellant and the respondent had entered into a consultancy agreement ('CA') which provided, inter alia, that the respondent was to provide assistance to procure for the appellant contracts from Celcom to construct and implement an Intelligent Network Platform for expansion of Celcom's mobile prepaid card system ('phase 6'). The CA further provided that the appellant was to pay the respondent a fee equivalent to 12% of the purchase amount paid by Celcom to the appellant for the phase 6 project and the calculation of the fee was to be based upon the purchase order received from Celcom. By a letter of award, Celcom awarded the appellant a contract of RM24m for 'supply, delivery, install, testing and commissioning and the provision of engineering services and training for Celcom Prepaid Mobile Service Enhancement, Database expansion and IN Platform Upgrading'. The respondent claimed that the appellant had failed to pay consultancy fees for Celcom's purchase order ('the disputed PO'). The respondent's claim was premised on the disputed PO which was issued by one Nik Kamaruddin Nik Ka ('Nik'). The appellant however contended that it was not liable to pay the respondent as the works reflected in the disputed PO was not connected to works done under phase 6.

Held, allowing the appeal with costs of RM25,000:

(1) There was no reasonable basis for the learned judicial commissioner to be wary of the evidence of DW2 or to entertain doubts as to her credibility

merely because of her previous association with the appellant. DW2's previous association with the appellant without more was not sufficient ground for the learned judicial commissioner to be wary of her evidence particularly when she was the person who made the request in the POs exhs P16 and P18 (see para 7).

(2) The respondent's claim was premised on the disputed PO which was issued by one Nik. In the circumstances, the requirement of the best evidence rule is that the maker of the document be called to testify. But the respondent did not call Nik to testify in support of their contention that the disputed PO was related to phase 6. In the absence of evidence to contradict the evidence adduced by the appellant that the disputed PO was not related to works under phase 6, the disputed PO could not be part of phase 6 (see para 8).

(3) Appellate interference is warranted when it has been shown that a decision was arrived at by a trial court without judicial appreciation of the evidence. In this case, the learned judicial commissioner had not properly analysed the entirety of the evidence which was given before her (see para 9).

[Bahasa Malaysia summary

Perayu dan responden telah memasuki perjanjian perundingan ('PP') yang memperuntukkan, antara lain, bahawa responden dikehendakki memberikan bantuan untuk mendapatkan kontrak-kontrak daripada Celcom untuk membina dan melaksanakan Intelligent Network Platform untuk pengembangan sistem kad prabayar mudah alih Celcom (Fasa 6). PP tersebut selanjutnya memperuntukkan bahawa perayu dikehendakki membayar kepada responden fi bersamaan 12% jumlah belian yang dibayar oleh Celcom kepada perayu bagi fasa 6 dan pengiraan fi dikehendakki didasarkan ke atas pesanan belian yang diterima daripada Celcom. Melalui surat award, Celcom mengawardkan perayu kontrak sebanyak RM24 juta untuk 'supply, delivery, install, testing and commissioning and the provision of engineering services and training for Celcom Prepaid Mobile Service Enhancement, Database expansion and IN Platform Upgrading'. Responden mendakwa bahawa perayu telah gagal untuk membayar fi perundingan untuk pesanan belian Celcom ('pesanan pembelian yang dipertikaikan'). Tuntutan responden adalah berdasarkan ke atas pesanan pembelian yang dipertikaikan yang dikeluarkan oleh seorang yang dikenali sebagai Nik Kamaruddin Nik Ka ('Nik'). Perayu walau bagaimanapun berhujah bahawa ia tidak bertanggungjawab untuk membayar responden memandangkan kerja-kerja yang dinyatakan di dalam pesanan pembelian yang dipertikaikan tidak berkaitan dengan kerja-kerja yang dibuat di bawah fasa 6.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM25,000:

(1) Tidak terdapat asas yang munasabah untuk pesuruhjaya kehakiman

berhati-hati dengan keterangan DW2 atau meragui terhadap kredibilitinya semata-mata kerana perhubungan sebelumnya dengan perayu. Perhubungan DW2 sebelumnya dengan perayu bukan alasan yang mencukupi untuk pesuruhjaya kehakiman berhati-hati terhadap keterangannya terutamanya apabila dialah orang yang membuat permohonan di dalam pesanan-pesanan pembelian lampiran P16 dan P18 (lihat perenggan 7).

(2) Tuntutan responden adalah berdasarkan atas pesanan pembelian yang dipertikaikan yang dikeluarkan oleh Nik. Dalam keadaan ini, keperluan untuk peraturan keterangan terbaik adalah pembuat dokumen tersebut dipanggil untuk memberi keterangan. Tetapi responden tidak memanggil Nik untuk memberi keterangan untuk menyokong hujahan mereka bahawa pesanan pembelian yang dipertikaikan adalah berkaitan kepada Fasa 6. Dalam ketiadaan keterangan untuk menentang keterangan yang dikemukakan oleh perayu bahawa pesanan pembelian yang dipertikaikan bukan berkaitan kepada kerja-kerja di bawah fasa 6, pesanan pembelian yang dipertikaikan tidak boleh menjadi sebahagian fasa 6 (lihat perenggan 8).

(3) Campur tangan mahkamah rayuan adalah wajar apabila ia telah ditunjukkan bahawa keputusan telah dicapai oleh mahkamah perbicaraan tanpa penelitian kehakiman terhadap keterangan. Dalam kes ini, pesuruhjaya kehakiman yang bijaksana tidak menganalisa dengan betul keseluruhan keterangan yang dikemukakan di hadapan beliau (lihat perenggan 9).]

Notes

For cases on document, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 420–421.

Cases referred to

UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785, FC (refd)

Appeal from: Suit No MT4–22–510 of 2003 (High Court, Shah Alam)

Sulaiman Abdullah (Alan Wong and Cliff Siow with him) (Zain Megat & Murad) for the appellant.

Sreether Sundaram (Murali B Pillai & Associates) for the respondent.

Aziah Ali JCA:

[1] The appellant and the respondent had entered into a consultancy agreement dated 1 February 2001 ('the CA') wherein the respondent was to

provide assistance to procure for the appellant contracts from Celcom (M) Sdn Bhd ('Celcom') to construct and implement intelligent network platform for expansion of Celcom's mobile prepaid card system (phase 6). The CA (exhs D23) provides that the appellant is to pay to the respondent a fee equivalent to 12% of the purchase amount paid by Celcom to the appellant for the phase 6 project. For future projects the rate would be 10% or lower. It was also provided vide cl 2 that the fee shall be calculated based upon the purchase order received from Celcom. By a letter of award (exh P2) Celcom awarded to the appellant a contract for the 'Supply, delivery, install, testing and commissioning and the provision of engineering services and training for Celcom Prepaid Mobile Service Enhancement, Database expansion and IN Platform Upgrading'. The total contract price was RM24,005,938.22.

[2] The respondent claims that the appellant has failed to pay consultancy fees amounting to RM496,656 as stated in the respondent's Invoice No PCB04/02 dated 19 July 2002 (exh P21) which was derived from Celcom's purchase order dated 15 July 2002 ('the disputed PO') for the sum of RM4,138,800 (exh P20). The appellant contends that it was not liable to pay the respondent as the works reflected in the disputed PO was not connected to works done under phase 6. The learned judicial commissioner (as Her Ladyship then was) gave judgment for the respondent, hence the appeal before us. Having considered the appeal records and the submissions of counsel for both parties we allowed the appeal and set aside the judgment of the High Court. Costs of RM25,000 here and below was awarded to the appellant.

[3] According to the appellant's general manager DW1 the respondent was the appellant's exclusive consultant for phase 6 only. The works reflected in the disputed PO which was issued by one Nik Kamaruddin Nik Ka was not connected to works done under phase 6 but was in respect of pre-paid multi tariff (national) and pre-paid multi tariff (international) and for pre-paid multi IN one card rated CDR. DW1 said that these works had nothing to do with pre-paid card system under phase 6 and did not come within the scope of work for phase 6. Celcom had issued the disputed PO directly to the appellant without any bid or tender made by the respondent. DW1 further testified that he did not respond to the respondent's invoice and request for payment because it was not part of phase 6 but he did explain orally why the appellant would not pay for the disputed PO DW1 had sought confirmation from Celcom and Celcom had through a reply from DW2 confirmed that only two purchase orders ie PO No 845 (exh P16) and PO No 846 (exh P18) were issued for phase 6. DW1 confirmed that payments had been made to the respondent in respect of these two POs. The appellant further says that the total sum for PO No 845 and PO No 846 was RM24,005,938.22 which was the total contract price between Celcom and the appellant for phase 6 (see p 175 appeal record). DW1 denied that he requested confirmation of deliverables under phase 6 from

Celcom to defeat the respondent's claim. In respect of the appellant's quotation of RM74,924,553.15 (pp 154–156 appeal record) DW1 explained that this was the appellant's original quotation for its general proposal to Celcom done prior to phase 6 for Celcom's evaluation. However after a series of discussions with Celcom it was agreed that RM24m would be executed under phase 6.

[4] DW2 who was Celcom's senior manager, Intelligent Network Unit from year 2001–2005 used to work for the appellant as systems engineer for one year. In her reply to the appellant (exh D34) DW2 confirmed that only two purchase orders ie PO No 845 (exh P16) and PO No 846 (exh P18) were issued for phase 6. DW2 said that all the hardware and software to be supplied by the appellant to Celcom for phase 6 were as per the two POs. DW2 disagreed with counsel for the respondent that the disputed PO was related to work done by the appellant under phase 6 and explained that this particular PO was for delivery of new hardware for a project totally different from phase 6.

[5] The learned judicial commissioner agreed with submissions by counsel for the respondent that the contract sum of RM24,005,938.22 was not an absolute figure but could change depending on Celcom's requirements because cl 4 of Celcom's letter of award provides for extension of the contract for a further period of up to one year by mutual agreement if deemed necessary. Clause 4 states as follows:

> 4. CONTRACT AGREEMENT
>
> PERNEC will enter into a contract with CELCOM for the period of one (1) year with orders placed through issuance of Purchase Order as and when required. The contract shall also give provision for an extension of up to one (1) year by mutual agreement if deemed necessary.

It was submitted that by cl 4 Celcom had reserved the right to continue to issue POs as and when required and also to extend the contract for up to a year depending on its requirements. It was contended that Celcom did and continued to issue POs over and above the value of the contract as and when required. The disputed PO was issued within five months after the letter of award and therefore the disputed PO must be within the award. Counsel had further submitted that the testimony of DW2 is suspect and should be viewed with caution because of her previous employment with the appellant. The learned judicial commissioner agreed and was 'wary of DW2's biasness because she was a former systems engineer with the Defendant'. The learned judicial commissioner further questioned why DW1 had to seek confirmation from DW2 regarding the two POs exhs P16 and P18 only in 2003 after the project was completed.

[6] Learned counsel for the appellant submitted before us that DW2 was never cross-examined nor was any suggestion put to her that she was biased due

to her previous association with the appellant. Thus it was submitted that there was no basis for counsel for the respondent to raise the issue of biasness on the part of DW2 in his submissions. It was further submitted that the respondent had failed to call any witness from Celcom to support its claim. Insofar as the disputed PO was concerned, it was a contract negotiated by Celcom directly with the appellant and this was confirmed by DW2 in her testimony that there was an urgent requirement for new hardware which was totally different from the scope of the award and Celcom had requested a quotation directly from the appellant. DW1 had also explained that he did not respond to the respondent's requests for payment because it was not part of phase 6. He testified that although he did not respond officially he did contact the respondent to explain why the appellant would not pay for the disputed PO and then he wrote to Celcom to seek confirmation of deliverables under phase 6. The reply he received was the letter from DW2 exh D34. For the respondent learned counsel repeated the submissions made before the learned judicial commissioner that the disputed PO was within the scope of the award for phase 6 based on the provisions of cl 4 of the CA.

[7] We have perused the appeal record and in particular the testimonies of the witnesses. On the issue of the trial judge's wariness in accepting the evidence of DW2, we are conscious of the reminder given by the Federal Court in *UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 that a trial judge has the advantage over an appellate court in hearing the witness and observing his demeanour and that a finding on a witness's credibility based on his demeanour is a personal opinion of a trial judge who had the audio-visual advantage of the performance of witnesses. Thus it should not, ordinarily, be disturbed at the appellate stage. In the present appeal we have perused the notes of evidence in particular the testimony of DW2 and we find nothing therein that indicates that DW2 was in any way bias in her answers to questions posed by counsel. We agree with counsel for the appellant that there was no basis for counsel for the respondent to raise the issue of biasness on the part of DW2 in his submissions when there was nothing in the notes of proceedings to show that such suggestion was put to her in cross-examination to afford her the opportunity to dispel any doubt as to her credibility. The learned judicial commissioner's wariness of the evidence of DW2 was premised on submissions of counsel for the respondent rather than Her Ladyship's assessment of the demeanour of DW2. Thus we find no reasonable basis for the learned judicial commissioner to be wary of the evidence of DW2 or to entertain doubts as to her credibility merely because of her previous association with the appellant. We found no evident contradictions and inconsistencies in her testimony. We are of the considered view that DW2's previous association with the appellant without more was not sufficient ground for the learned judicial commissioner to be wary of her evidence particularly when she was the person who made the request in the POs exhs P16 and P18. In the grounds of judgment the learned judicial

commissioner had also questioned why DW1 sought confirmation on the deliverables for phase 6 only in 2003. We are of the view that the learned judicial commissioner had not suffciently appreciated the testimony of DW1. A perusal of the testimony of DW1 showed that a letter of demand dated 25 April 2003 was issued by Lainah Yaacob & Zulkifli, advocates and solicitors, acting on behalf of the respondent (exh P9 at p 163). According to DW1 the appellant's legal department then referred this letter to him and he then sought confirmation from Celcom on deliverables under phase 6. Thus this would explain why DW1 sought confirmation only in 2003.

[8] The respondent's claim was premised on the disputed PO which was issued by one Nik Kamaruddin Nik Ka. In the circumstances the requirement of the best evidence rule is that the maker of the document be called to testify. But the respondent did not call Nik Kamaruddin to testify in support of their contention that the disputed PO was related to phase 6. We are of the view that in the absence of evidence to contradict the evidence adduced by the appellant that the disputed PO was not related to works under phase 6, the disputed PO could not be part of phase 6.

[9] Appellate interference is warranted when it has been shown that a decision was arrived at by a trial court without judicial appreciation of the evidence. We agree with counsel for the appellant that the learned judicial commissioner has not properly analysed the entirety of the evidence which was given before her. For the reasons stated we allowed the appeal and set aside the decision of the High Court with costs of RM25,000 here and below. Deposit was ordered to be refunded.

Appeal allowed with costs of RM25,000.

Reported by Ashgar Ali Ali Mohamed